Supreme Court, U. S.
FILED
FEB 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76–944

RICHARD NIXON,

Petitioner,

v.

WARNER COMMUNICATIONS, INC., and
NATIONAL BROADCASTING CO., INC., *et al.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DI CESARE - Printing — 331-4181 — Washington, D.C. 20004

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

QUESTION PRESENTED

Whether, in all the circumstances of this case, the Court of Appeals erred in applying the District of Columbia's long-established common law right of public inspection and copying of court records, so as to permit all members of the American public, upon request, to obtain copies of tape recordings admitted into evidence and played to the jury and to members of the public present at the Watergate Cover-Up Trial, *United States v. Mitchell, et al.*

STATEMENT OF THE CASE

The respondents in this Court are Warner Communications, Inc. ("Warner"), a diversified communications company which, among other things, manufactures and distributes documentary and other phonograph records, and four organizations active in broadcasting (CBS, NBC, ABC and the Radio Television News Directors Association, collectively referred to herein as "the broadcasters").

The history of this case up to and including the opinion of the Court of Appeals is adequately set forth in the opinion of that court. Petition for Writ of Certiorari (hereinafter cited as "Petition"), App. A. Subsequently, the Court of Appeals denied Mr. Nixon's Petition for Rehearing and Suggestion for Rehearing en Banc. *Id.*, App. B. On December 9, 1976, Mr. Nixon filed a petition to stay issuance of the Court of Appeals' mandate pending the filing of a petition for a writ of certiorari. The court granted that motion in part, but issued the mandate to the extent of directing the District Court to develop a plan for copying and distributing the tapes. App. 1, *infra*, p. A-1.

On December 22, 1976, Judge Sirica issued a Memorandum and Order setting forth a tentative procedure for developing the distribution plan. App. 2 *infra*, pp. A-2 to A-5. On January 11, 1976, Warner and the broadcasters filed a memorandum on implementation of Judge Sirica's order, App. 3, *infra*, pp. A-6 to A-13, which will satisfy all criteria set forth in the Court of Appeals opinion governing copying and distribution of the tapes.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals in this case is based upon four totally unexceptionable principles that are unworthy of further review by this Court: (1) There is in the District of Columbia a local common law right to inspect and copy public records, including judicial records, and that right, which is "fundamental to a democratic state," has been settled at least since 1894. Petition, 8a-11a. (2) The common law right to inspect and copy judicial records extends to exhibits. *Id.*, 12a-14a. (3) The right to inspect and copy judicial records is not absolute, and courts will refuse to apply it when "justice so requires", a decision within the "sound discretion" of the courts. *Id.*, 14a-15a.(4) The District Court abused its discretion in the particular circumstances of this case by denying respondents' common law right to inspect and copy evidence introduced in open court. *Id.*, 16a-25a.

The Court of Appeals upheld the common law right asserted by Warner and the broadcasters on behalf not merely of themselves, but also of the general public. In laying down criteria for release of the tapes, the court required that distribution be "on an equal basis to all persons desiring copies." Petition, 25a. Thus, the tapes would *not* be released for any specific purpose, such as "for radio and television broadcast and for sale in the form of phonograph records and tape cassettes," as suggested by Mr. Nixon. *Id.*, 3. Rather, the tapes would be released to interested members of the public for whatever uses they see fit to make of them.

The Court of Appeals did not decide any constitutional or statutory question, and it did not enter into a conflict with the decision of any other court. Nor did it decide any broad common law question. It noted that "[b]ecause no clear rules can be articulated as to when judicial records should be closed to the public, the decision to do so necessarily rests within

the sound discretion of the courts, subject to appellate review for abuse." *Id.*, 14a. Thus, the court properly declined to consider in the abstract whether particular types of exhibits such as pornographic movies or tapes of wiretapped conversations should be subject to public inspection. In short, the Court of Appeals decision is narrow; it is one step in the gradual development of a body of case law delineating in specific factual contexts the common law right to inspect and copy public records.

Mr. Nixon tenders three issues for plenary review by this Court: (1) whether this Court's opinion in *United States v. Nixon*, 418 U.S. 682 (1974), precludes an exercise of the common law right in this case, Petition, 2-3, 13, 15-16; (2) whether the common law right to inspect and copy does apply to tape recordings and other physical evidence obtained by compulsory process and used as evidence in a federal court trial, *see id.*, 3, 13, 16-19; and (3) whether the Court of Appeals improperly overrode the District Court's determination that the public's enjoyment of its common law right must be delayed indefinitely lest release of the tapes prejudice any possible retrial of defendants in the Watergate conspiracy case, *id.*, at 3, 13, 19-20. None of these issues is worthy of plenary review by this Court.

1. THE DECISION BELOW DOES NOT VIOLATE *UNITED STATES V. NIXON*

The first issue tendered for plenary review by Mr. Nixon is whether the decision below is inconsistent with *United States v. Nixon*, 418 U.S. 682 (1974). There, this Court recognized a constitutionally based presumptive privilege for confidential presidential communications. The Court found that the privilege rests on "the values to which we accord deference for the privacy of all citizens" and "protection of the public interest in candid, objective and even blunt or

harsh opinions in Presidential decision-making." 418 U.S., at 708. In light of those interests, it is clear that the privilege protects the *confidentiality* of presidential conversations, and the theme of confidentiality pervades this Court's opinion in *United States v. Nixon*. However, as the Court of Appeals noted below, "the tapes played at trial are no longer confidential." Petition, 25a. The tapes that Warner and the broadcasters seek to copy have all been played in open court, transcribed, and admitted into evidence at a criminal trial, and their contents have been widely disseminated to the public.[1] Whatever the adverse consequences to the ongoing interests of the United States or to the Presidency from a breach of the confidentiality of these tapes, those consequences have already occurred, and there can be no further interest in the confidentiality of the tapes.[2] If ever there was material as to which there can be no claim of confidentiality or privacy, it is the tapes at issue in this case.

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[1] Mr. Nixon overstates the scope of the opinion below. The subject matter of this case is *not* all of "the subpoenaed materials" at issue in *United States v. Nixon*. Petition, 13. Some of those materials did not survive Judge Sirica's *in camera* inspection, while much of the material finally turned over to the Special Prosecutor was never introduced as evidence at trial. This case concerns only those tapes and portions of tapes which actually became court exhibits and which were actually played during the Cover-Up Trial.

[2] In *United States v. Nixon, supra*, this Court stated that it could not "conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." 418 U.S., at 712. Nor is it credible that advisors will be less candid because of the possibility that tape recordings of their remarks, having been played in open court at a public trial and quoted and described in the press, will also be disseminated by other means. The possibility of additional dissemination cannot have any significant marginal deterrent effect on candid communication by presidential advisors, and thus such incremental dissemination does not threaten any adverse consequences for the values that the presidential privilege is designed to protect.

This Court in *United States v. Nixon* spoke of the "high degree of deference" owed to presidential conversations, 418 U.S., at 715, and the Court clearly required that extraordinary measures be taken to prevent unwarranted incursion on presidential confidentiality. However, the Court's references to "deference" were in the context of a discussion of the "District Court's responsibilities in conducting the *in camera* examination of Presidential materials or communications," 418 U.S., at 714, to determine which materials would remain confidential and which would not. As the Court of Appeals noted, the passages in the opinion on which Mr. Nixon relies all referred to the District Court's obligation to ensure the confidentiality of presidential conversations which were either *irrelevant or inadmissible* in the criminal case. Petition, 24a-25a. Once the claimed privilege of confidentiality has been defeated by the needs of justice, and the formerly privileged communications have been admitted into evidence, they should be treated like any other evidence.[3] Nothing in *United States v. Nixon* is to the contrary.

2. TRIAL EXHIBITS ARE JUDICIAL RECORDS

The second question tendered by Mr. Nixon is whether the common law right to copy extends to tapes, films, and similar physical exhibits. There is no reason to believe that requests to copy such materials are so frequent as to justify review by this Court. There is no decision in conflict with that of the Court of Appeals below. Indeed, there is no other

[3]Mr. Nixon incorrectly attributes to the Court of Appeals the holding that the "necessary consequence" of admission of presidential conversations into evidence is that they will be disseminated to private parties. *See* Petition, 13, 15. Rather, as would be the case with respect to any other evidence admitted at a criminal trial, the common law right to inspect and copy such presidential communications in a particular case could be denied if "justice so requires".

federal case in point; consequently, if certiorari were granted, this Court would not have the benefit of prior consideration of the issue by a number of lower courts in varying factual settings. In sum, review by this Court at this stage of the development of the law would be highly premature. Finally, the decision below is plainly correct.

Mr. Nixon's central argument is that trial exhibits are not judicial records. In rejecting that contention, the Court of Appeals pointed out that Rule 10(a) of the Federal Rules of Appellate Procedure provides that "[t]he original papers *and exhibits* filed in the district court . . . shall constitute the record on appeal" (emphasis supplied). *Id.*, 12a. The court found further support for this holding in *Manual for the Clerks of the United States District Courts*, prepared under statutory authority by the Judicial Conference of the United States, which classifies exhibits as "auxiliary case records" and which requires that documentary exhibits in cases of historical significance be retained permanently in the case file. *Id.*, 12a & nn. 26, 28. Moreover, logic and experience support the court's conclusion, since "[d]enying public access to real and documentary evidence would be inconsistent both with the common law's attempt to provide the public with complete information and with what Judge Gesell found to be the district court's practice of providing copies of documentary and photographic exhibits on request." *Id.*, 13a.[4] Thus, as

[4]Judge Gesell specifically found that the common law right to inspect and copy *all* court records extends to exhibits in the custody of the Clerk:

> "As a matter of practice in this court, if requested, a copy of any document or photograph received in evidence is made by the Clerk and furnished at cost of duplicating to any applicant, subject only to contrary instructions that may

Judge Gesell had noted, "there is congressional, judicial and executive recognition of the need to make available and preserve materials from a trial like the present, including the evidentiary tapes, bearing as they do directly on executive conduct at the highest levels." *Id.*, 40a.

There is no reason in principle to distinguish between what Mr. Nixon calls "physical" exhibits and "documentary" exhibits. Tapes and films are normally, as in the instant case, introduced for their content rather than for the physical qualities of the materials out of which they are made. They are testimonial rather than physical evidence. In this respect they are indistinguishable from writings, and quite distinguishable from bloody shirts. *If* any distinction is to be drawn between physical and documentary exhibits, tapes ought to be classed as documents. But as Judge Gesell observed, "the fact the evidence is in aural form is of no special consequence. The tape exhibits are in evidence and have therefore come into the public domain and the public should have the opportunity to hear them." Petition, 41a.

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be given by the trial judge at the time of trial. This privilege of the public to inspect and obtain copies of all court records, including exhibits while in the custody of the Clerk, is of long standing in this jurisdiction and reaches far back into our common law and traditions. Absent special circumstances, *any* member of the public has a right to inspect and *obtain copies* of such judicial records. *Ex parte Drawbaugh*, 2 App. D.C. 404, 407 (1894). *See also, United States v. Burka*, 289 A.2d 376 (1972); *Belt v. Pr. George's County Abstract Co.*, 73 Md. 289, 20 A. 982 (1890).

"The Court stated in *Drawbaugh*,

. . . any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access and to its records, according to long-established usage and practice." Petition, 38a-39a (emphasis in original). *See also id.*, 39a–41a.

Although Mr. Nixon objects to the "indignity" of distribution of recorded words, that indignity is no greater than the embarrassment that may result from public reporting of unseemly facts revealed by courtroom testimony or in written exhibits. Mr. Nixon apparently does not object to a common law right to copy a transcript of testimony or written exhibits. Moreover, the Court of Appeals left ample discretion in trial courts to deny public access to copies in order to prevent embarrassment: "But even if preventing embarrassment may sometimes justify access restrictions, there is plainly no justification for such restrictions here. The tapes at issue are *not* recordings of bedroom or other intimate conversations, and the embarrassment Mr. Nixon fears is *not* republication of highly personal matters. Rather, we deal with conversations between business associates admitted into evidence as proof of criminal misconduct." Petition, 22a (emphasis in original).[5]

Finally, though Mr. Nixon can find no "apparent" distinction between the tapes of his conversations and "tapes of wiretapped conversations and pornographic film exhibits," *id.*, 17, the distinctions are obvious. As the Court of Appeals made clear, copying may be prohibited where "justice so requires." That phrase is simply a semantic variant of the standard of "sound discretion" or "abuse of discretion." *Id.*, 14a; *see id.*, 17a, 21a, 24a, 25a. Any application to copy

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[5] Thus, Mr. Nixon grossly mischaracterizes the court's opinion when he labels it a "precedent which puts in serious doubt the power of a district court to control the uses to which its own process is put and to protect the rights of parties and witnesses in the criminal justice system." Petition, 15. On the contrary, under the opinion District Courts retain full power and discretion to protect all the rights of parties, witnesses and the public, as justice requires.

wiretapped conversations would have to be decided in the light of 18 U.S.C. § 2510 *et seq.*, as well as the trial judge's good sense. Similarly, an application to copy a pornographic film would raise questions concerning the lawfulness of possession of such material and concerning copyright and other property rights. In the instant case, Mr. Nixon has not asserted at any time any copyright or other proprietary interest in the tapes at issue. Therefore, the question whether trial exhibits are "private property" and hence immune from copying under the common law right is not presented by this case.[6]

3. RELEASE OF THE TAPES WILL NOT CAUSE UNDUE "PRETRIAL" PUBLICITY

The third issue Mr. Nixon tenders for review is whether the release of the tapes will create undue pretrial publicity in the event of a retrial of any of the defendants in the Watergate Cover-up Trial. However, the record in this case does not present that issue.

None of the Watergate defendants themselves seeks review by this Court of that issue. None of them raised the issue in the District Court. Only Mr. Haldeman raised it in the Court of Appeals–and he did so in a *pro forma* one-sentence statement. Petition, 20a, n.47. Mr. Nixon, who is not a party to the criminal case, has no standing to raise the issue of prejudicial pretrial publicity. He admits that he has "no direct

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[6]The master set of tapes (from which all subsequent copies would be made) would be prepared by copying from the Special Prosecutor's copy of the White House tapes. The original White House tapes and the copy in the court record would not be touched. *See* App. 3, *infra*; Petition, 5a.

interest in the criminal case," *id.* 9, n.3, and this case has none of the features that justify the assertion by one party of the rights of others. *See, e.g., Singleton v. Wulff*, 44 U.S.L.W. 5213, 5215-16 (1976); *id.*, at 5218-19 (Powell, J., joined by Burger, C.J., and Stewart & Rehnquist, JJ., concurring in part and dissenting in part); *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975).

Moreover, the possibilities of prejudice are, as the Court of Appeals noted, exceedingly remote. The Court of Appeals has affirmed the convictions of three of the four convicted *Mitchell* defendants, and those convictions are thus presumptively valid. In the case of defendant Mardian, whose conviction was reversed, the Government has decided not to proceed further.[7] Therefore, there are no retrials in prospect. As the Court of Appeals noted, "the very fact that a second trial is only a possibility makes the interest in preventing prejudicial publicity less than compelling." Petition, 17a.

The Court of Appeals also pointed out that the materials at issue are not "an inadmissible confession, a list of prior convictions, or other prejudicial evidence that, although part of the court's records, was kept from the jury. Rather, [respondents] seek tape recordings from which inadmissible statements have been carefully eliminated. These tapes were played to the jury, and presumably will be replayed at any retrial. The transcripts of these conversations have received wide circulation and have been reenacted in various forums." *Id.*, 18a-19a.

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[7]*See* Government's Motion to Dismiss Indictment, *United States v. Mardian*, Cr. No. 74-110 (D.D.C. January 17, 1977).

Finally, as the Court of Appeals concluded, "[i]f the chance of a retrial justifies interfering with the common law right of access here, then the public can be denied permission to inspect indictments, motions, transcripts, exhibits, or opinions in every case of public importance, at least until all appeals are exhausted." *Id.*, 17a-18a.

CONCLUSION

The Court of Appeals' decision was a narrow one; it arose out of a particular factual setting not likely to be repeated, and it was reached under well-established principles of local common law. The case does not warrant review by this Court.

None of the issues presented in No. 75-1605 in this Court, *Nixon v. Administrator of General Services,* prob. juris. noted, Nov. 29, 1976, is relevant to the instant case. That case involves the constitutionality of an Act of Congress, and an assertion of proprietary rights by Mr. Nixon. Neither point is involved in the instant case. This Court's evaluation of the Court of Appeals' opinion in the instant case will not be aided by this Court's decision in No. 75-1605, whatever it may be. Therefore, Warner respectfully submits that there is no reason to hold this case for No. 75-1605.

The Court of Appeals recognized that the public interest served by the common law right to inspect and copy court records is closely related to the interests served by the First, Fifth and Sixth Amendments. Petition, 10a-11a. In the instant case, the public interest in prompt vindication of the common law right is particularly compelling since the tapes at issue reveal abuse of public office by some of the Nation's highest officials during Mr. Nixon's tenure as President. The record amply shows that the aural qualities of the cover-up conversations, which are captured only on the tapes, are crucial facts for a full understanding of the cover-up and the ensuing trial in *United States v. Mitchell. E.g.*, Court of Appeals Joint Appendix 92-118; Petition, 2a. This Court has long recognized that the interest in "an informed and enlightened public opinion" requires the prompt release of such information. *E.g., Bridges v. California,* 314 U.S. 252, 268-69 (1941); *International News Service* v. *Associated Press,*

248 U.S. 215, 235 (1918); *Nebraska Press Ass'n v. Stuart*, 44 U.S.L.W. 5149, 5156 (1976); *id.*, at 5170 (Brennan, J., joined by Stewart & Marshall, JJ., concurring). And yet more than two years have already elapsed since Warner and the broadcasters first sought vindication of the common law right of the public to inspect and copy these tapes. Each additional day of delay is a further erosion of the very right sought to be vindicated.

For the foregoing reasons, the petition for certiorari should be promptly denied.

Respectfully submitted,

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APPENDIX

APPENDIX 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1409 September Term, 19 76
Miscellaneous No. 74-128

United States of America

v.

John Mitchell, et al.

In Re: National Broadcasting Company, Inc., et al.,
Appellants

United States Court of Appeals
for the District of Columbia Circuit
FILED DEC 10 1976
GEORGE A. FISHER
CLERK

No. 75-1410 Miscellaneous No. 74-128

United States of America

v.

John Mitchell, et al.

Warner Communications, Inc.,
Appellants

Before: Bazelon, Chief Judge; MacKinnon, Circuit Judge and Merhige*, United States District Judge for the Eastern District of Virginia

ORDER

On consideration of the motion of respondent Nixon for stay of mandate, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to stay the issuance of the certified copy of this Court's judgment for a period of 30 days from the date of this order, and, it is

FURTHER ORDERED by the Court that during the pendency of this stay the record is remanded to the District Court for the limited purpose of commencing the development of a plan of distribution, in accord with this Court's opinion of October 26, 1976.

Per Curiam

Circuit Judge MacKinnon would not remand the record

*Sitting by designation pursuant to Title 28 U.S.C. § 292(d).

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APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, et al.

IN RE: NATIONAL BROADCASTING CO., et al.

(filed Dec. 22, 1976)

MEMORANDUM AND ORDER

On December 10, 1976, the Court of Appeals remanded the record in this case to this Court for the "limited purpose of commencing the development of a plan of distribution [of copies of the tapes introduced into evidence and played to the jury in United States v. Mitchell, Cr. No. 74-110], in accord with [the Court of Appeals' earlier opinion of October 26, 1976." This order is intended to begin that process.

I.

The first thing that must be done is to set a procedure for developing the plan. The Court has tentatively decided to proceed in the following manner. First, it will request that the parties in this case who are seeking copies of the tapes submit a proposed plan or plans for distribution. The Court will then

allow comment on the proposed plan or plans by those parties in this case who wish to do so. Thereafter, the general public will be given an opportunity to comment on a plan or plans that might be acceptable. When all the comments from the public have been received and considered, the Court will then decide on the final plan for distribution.

The Court is aware that this possible procedure is somewhat vague and may not be completely satisfactory. The Court, therefore, would like to have comments on it from the parties. In particular, if comment by the public is in fact appropriate, the Court would like to have suggestions on how they might best be notified and given an opportunity to comment. For example, the Court would like to know whether notice through the *Federal Register* or through press release or through both would be appropriate.

II.

In any event, it appears at this time to be safe—and in the interest of speeding matters up—also to ask the parties seeking copies of the tapes to begin the process by submitting a proposed plan or plans for the tapes' distribution. Of course, there may be many other matters worth discussing, but of particular concern to the Court at this time are the following:

A. PRODUCTION OF COPIES

How can the Court assure that copies of high quality will be produced relatively quickly, at a reasonable cost, and in sufficient quantity to satisfy the likely demand for them? How can the Court assure that no unfair competitive advantage is conferred through the copying process? More specifically, who should be entrusted with the task of producing the copies? What form should the copies take—phonograph record or tape?

One possible solution to at least some of these problems might be to ask the archivist of the United States to undertake this task. It does appear that 31 U.S.C. § 686 (1970) permits the Court and the archivist to enter into an agreement to do this, and it does appear, from the Court's preliminary inquiry, that the archivist has the capability to perform the work. There may be a better way that the Court is not aware of, but the parties should specifically consider this possibility and, if unsatisfied with it, give reasons against it.

B. DISTRIBUTION OF COPIES

How can the Court assure that the copies will be distributed fairly, promptly, and at reasonable cost? How can the Court assure that no unfair competitive advantage will be conferred through the distribution process? More specifically, who should be chosen to distribute the copies? How can the Court assure that each person who wishes to purchase a copy will be able to do so at approximately the same time? How shall interested persons be notified that copies of the tapes are available? What should be the price set for purchase of copies?

The Court suggests that perhaps the archivist might undertake this task also. The parties should specifically address this possibility.

III.

Accordingly, in order to begin consideration of these matters, it is this 22nd day of December, 1976,

ORDERED that petitioners National Broadcasting Company, Inc., American Broadcasting Companies, Inc., CBS, Inc., Radio Television News Directors Association, and Warner Communications, Inc., have twenty days in which to make such comment on the procedures for developing a final plan for distribution as they deem appropriate, and to submit a proposed plan or plans to the Court; and it is

FURTHER ORDERED that Mr. Richard Nixon, the Special Prosecutor, the defendants in *United States v. Mitchell*, Cr. No. 74-110, and the other parties in this case, have ten days thereafter in which to submit their comments on the procedures suggested for developing a final plan; and it is

FURTHER ORDERED that all of the parties in this case shall have this same additional ten days in which to submit comments on any plans for distribution that they have not proposed.

/s/ JOHN J. SIRICA
United States District Judge

APPENDIX 3

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 74-128

UNITED STATES OF AMERICA

v.

JOHN D. MITCHELL, *ET AL.*

IN RE NATIONAL BROADCASTING COMPANY, INC.; AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; RADIO TELEVISION NEWS DIRECTORS ASSOCIATION; PUBLIC BROADCASTING SERVICE; and WARNER COMMUNICATIONS, INC.

MEMORANDUM OF APPLICANTS, NATIONAL BROADCASTING COMPANY, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS INC., RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, PUBLIC BROADCASTING SERVICE, AND WARNER COMMUNICATIONS, INC., ON IMPLEMENTATION OF THE COURT'S MEMORANDUM AND ORDER OF DECEMBER 22, 1976

This memorandum is submitted on behalf of all applicants before the Court in response to the Court's

Memorandum and Order of December 22, 1976. It sets forth the views of the applicants as to how copies of the tapes introduced in evidence and played to the jury in *United States v. Mitchell* should be prepared and distributed to the public.

The core conclusion of the memorandum is that the National Archives and Records Service is ready, willing and able to undertake all the tasks required to prepare a master tape and distribute copies to the public, and that the Court should enter an order permitting it to do so as promptly as is legally possible.

I.

At the outset, applicants express their agreement with the Court's view that the applicants should first submit their suggestions–by this memorandum–as to the preparation and distribution of the tapes; that all other parties to the action should then be given the opportunity to comment on those views; that the general public should then be permitted to express its views to the Court; and that the Court should then determine the final plan for distribution.

In aid of that procedure, the General Services Administration ("GSA") has advised the applicants that it is prepared to print in the *Federal Register*, at the request of the Court, the complete text of this proposal, together with instructions to members of the general public as to how they may submit comments to the Court. The applicants believe that by this means, and any press release with respect thereto that the Court may deem appropriate, the public can be fully informed of this proposal, and the Court can gain the benefits of public participation in the development of a final plan for distribution of the tapes.

II.

A. PREPARATION OF A MASTER TAPE.

The applicants have conferred with the Archivist of the United States, Dr. James B. Rhoads and the Deputy Archivist, Dr. James E. O'Neill, with respect to the willingness and ability of the National Archives and Records Service ("National Archives") to prepare a "master tape" which would include the sections of tapes introduced in evidence in the *Mitchell* trial. The Archivist has advised us that the National Archives is willing and able to assume the responsibility for preparing such a tape. The procedure to be followed would be as follows:

1. The master tape would be made by dubbing (copying) either the Court's copy of the tapes (Copy A) or the Special Prosecutor's copy (Copy B). The Special Prosecutor is willing to make available the copy in his custody in accordance with a plan adopted by the Court. The applicants have been advised by the National Archives that Mr. Robert Halvorson, a consultant to the Special Prosecutor's office during the *Mitchell* trial with respect to the playing of the tapes in court, is now a consultant to the National Archives and would be available to supervise the dubbing of the tapes. Mr. Halvorson is closely familiar with the tapes themselves and would be responsible for ensuring that only those portions of Copy A or B that were played to the jury would appear on the master tape. Mr. Halvorson would be advised by another audio engineer acceptable to the National Archives.

2. The dubbing would be carried out in the National Archives building itself. The National Archives is prepared to take all necessary steps to ensure the security and integrity of all tapes entrusted to it or produced by it.

3. The master reels would be a series of 30-minute seven-inch reels played at a speed of 7.5 inches per second (IPS), monaural, and using standard NAB equalization. We propose the speed of 7.5 IPS because tapes of speech are normally played by the broadcast media at that speed. The tapes were played to the jury at a speed of 3.75 IPS. However, during the dubbing, the machine playing the original could be run at 3.75 IPS, and the copying machine could be run at 7.5. The difference in speed would not present any risk to the original tape. The highest quality audio equipment would be used in the preparation of the master tape.

4. The segments of conversation would be copied in chronological order rather than in the order in which they were played to the jury. The master reel may include some identification of each segment of conversation, by reference to date, time, location and/or participants, and/or to the transcript page. This proposal would not complicate or delay the dubbing process.

5. We have no entirely reliable figure for the number of reels needed for the master set. Our best estimate is that approximately 40 will be required (based on an estimated playing time of 18- 22 hours)

B. PREPARATION AND DISTRIBUTION OF COPIES.

After the master tape has been made, copies would be prepared for distribution to all members of the public who wish to purchase them. The applicants have conferred with John H. McLean, the Director of the National Audio Visual Center ("Center"), a Division of the National Archives. The Center is experienced in the preparation and distribution of audio and visual materials on behalf of the United States Government and has an existing organization and procedures

for carrying out that function. Mr. McLean has advised the applicants that the Center is willing and able to make copies of the master tape and to distribute them to the public on the following basis:

1. After the master tape has been made, the Center would prepare copies of the master tape for distribution to the public.

2. Mr. McLean estimates that the Center can make and distribute the tapes to the public for a total price of $3.75 to $4.00 per one-hour cassette reel, at 1.875 IPS, or $5.00 to $5.75 per one-hour tape reel, at 3.75 IPS. Included in those prices are complete transcripts of the tapes, packaging and mailing. The Center would distribute to the public individual cassette or tape reels, combinations thereof, or entire sets, in accordance with specific orders from customers. The Center will also accept orders for tapes for playback at 7.5 IPS; these would be available for $5.00 to $5.75 per 30-minute reel in complete sets only.

3. The public would be informed of the availability of the tapes and the method of ordering them through publication in the *Federal Register* of a notice setting forth the relevant details. The National Archives would also issue a press release and would engage in its usual advertising with respect to the availability of the tapes for purchasing.

4. The Center would contract out the actual preparation of copies from the master tape. The contracting entity would be one with whom the Center has dealt in the past, and one in whose competence, integrity and general reliability the Center has complete confidence. All necessary steps would be taken to ensure the security and integrity of all materials handled by the contracting entity.

5. The Center would supply the public with copies of the tapes on individual orders, and would continue to have copies made so long as orders were received. The distribution process would commence with the publication in the *Federal Register* of the notice referred to in paragraph 3 above. All members of the public who submitted orders to the Center within 21 days of publication of the notice would receive copies of the tapes on the same day. Copies would be picked up by those members of the public who wished to do so personally, or would be mailed (at the Center's expense).

III.

The National Archives is prepared to enter into a memorandum of agreement with the Court pursuant to which the Court would effect the transfer of Copy A or Copy B to the National Archives, and the National Archives would agree to prepare the master tape and (through the Center) to carry out the distribution process set forth herein.

IV.

In its statement to counsel prior to the issuance of its December 22, 1976 Order, the Court indicated that after all responses had been received with respect to the development of a plan of distribution of the tapes to the public, the Court would set the matter down for a hearing at the earliest opportunity. The applicants have been advised that appropriate representatives of the National Archives and the Center are prepared to appear and testify in detail with respect to the proposal set forth herein.

CONCLUSION

Applicants submit that the foregoing plan meets all appropriate requirements for distribution of the Watergate Cover-Up Trial tapes to the public. The National Archives would assume responsibility for the entire process. No administrative burden would be imposed on the Court. The master tape would be prepared under the auspices of responsible, experienced public officials in a secure location. The preparation and distribution of copies would be carried out by a government agency experienced in such matters. All members of the public would have an equal opportunity to participate in a prompt initial distribution of tapes on a single day. Thereafter, tapes would continue to be available to members of the public on a first-come-first-served basis. Members of the public could purchase, at a low cost, entire sets of tapes or any lesser combination of tapes they desired.

Every stage of the preparation and distribution of tapes would be carried out by the National Archives, or under its close supervision. Therefore, the Court would be assured that there would be adequate security; no undue commercialization and no unfair advantage or disadvantage to anyone.

Applicants respectfully urge the Court to adopt the foregoing plan; they are prepared to submit an appropriate order and, after further consultation with the National Archives, a proposed memorandum of agreement.

Respectfully submitted,

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